

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

PHILLIP McNEAL,

Plaintiff,

v.

Case No. 2:09-cv-00306

NELSON BROTHERS, LLC,  
CATENARY COAL COMPANY, LLC,  
EXPLO SYSTEMS, INC.,  
ELITE COAL SERVICES, LLC, and  
JOHN DOE,

Defendants.

PROPOSED FINDINGS AND RECOMMENDATION

By Order entered December 15, 2009 (docket # 48), the presiding District Judge referred the pending motion to dismiss complaint (# 42) to the undersigned for submission of proposed findings and recommendation for disposition. The motion is based on Plaintiff's failure to comply with the discovery rules.

On January 13, 2010, the undersigned conducted a hearing on the motion, with Plaintiff present in person and by counsel. At the hearing, Plaintiff's attorney submitted a response to the motion to dismiss and otherwise complied with the Order entered on January 6, 2010, with respect to payment of costs associated with her failure to attend a hearing on January 6, 2010. In addition, Plaintiff's attorney served defense counsel with discovery responses. Her response to the motion to dismiss recites that she has experienced ill health and has required on-going treatment for

a serious medical condition.

During the hearing, Plaintiff stated under oath that he wishes to continue to prosecute this civil action, and to do so with Ms. Morton as his counsel. The court explained the necessity of complying with the Federal Rules of Civil Procedure. Plaintiff requested that he receive copies of all documents served and filed in the action which the defendants and the court agreed to do.

In light of the desire of Plaintiff to prosecute this civil action and his attorney's efforts to produce discovery material, the undersigned proposes that the presiding District Judge **FIND** that the sanctions imposed heretofore are sufficient to insure Plaintiff's and his attorney's diligent prosecution of this action.

It is respectfully **RECOMMENDED** that the motion to dismiss (# 42) be denied.

The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable John T. Copenhaver, Jr., United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, Plaintiff shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which

objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to Judge Copenhaver.

The Clerk is directed to add Plaintiff's address and telephone number (Rt. 1, Box 163, Oak Hill, WV 25901, (304) 465-1920) to the docket sheet so that all parties and the court can serve him with documents. The Clerk is further directed to file this Proposed Findings and Recommendation, to mail a copy of the same to Plaintiff, and to transmit it to counsel of record.

January 13, 2010

Date

Mary E. Stanley  
Mary E. Stanley  
United States Magistrate Judge